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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of HARRIET and ROBERT ANDERSON.	
HARRIET ANDERSON, Appellant, v. ROBERT SCOTT ANDERSON, Respondent.	A090761 (San Mateo County Super. Ct. No. F358177)

Harriet Anderson filed a timely notice of appeal from two orders deciding a number of property and support issues. We affirm.

BACKGROUND

Appellant and respondent Robert Scott Anderson were married in 1989 and had two children before appellant commenced dissolution proceedings in 1992. Respondent was ordered to pay pendente lite monthly spousal and child support.

A third child was born in 1994, during an apparent reconciliation between the parties. When judicial proceedings resumed in November of 1995 the court made an order increasing the levels of spousal and child support, reserving jurisdiction as to the issue of arrearages in support, and bifurcating the question of marital status from all other issues set for trial.

Trial took three days in January of 1998. A number of issues were decided at that time but were not memorialized until a decree of dissolution was entered December 29,

1998 (nunc pro tunc to December 31, 1995). One of those issues was a stipulation that the date of separation was December 31, 1993. The current monthly support levels were again increased. The court ordered that spousal support "will terminate nine months after the payment of a minimum of $20,000 by Husband to Wife for work search and relocation expenses." If this payment was not made, spousal support would continue "indefinitely." Reserved for further determination were (1) the community property interest in various accounts with respondent's employer, and (2) the amount of child and spousal support arrearages owed by respondent to appellant. With respect to the second issue, and with the apparent consent of the parties, a deputy in the family support division of the district attorney's office familiar with the case was appointed special master.

In March of 1998 respondent made the $20,000 payment to appellant.

In November of 1999 respondent moved to "Confirm Special Masters Acctng." He advised the court that "I am prepared to accept the accounting by the special master" that he owed spousal and child support arrearages of specified amounts "without modification if [appellant] does so." Other matters, including the amount "owing to [appellant] under [the] judgment," were also included. The following month the trial court ruled that the total arrearages owed by respondent was $38,263.31. The court made a finding that "the additional reimbursements due [appellant] by respondent under the judgment total $16,468.57. Respondent's payment of $20,000.00 to [appellant] in March 1998 from a 401(k) loan pursuant to the judgment shall be applied in satisfaction of said obligation. The balance of $3,531.43 shall be applied toward spousal support arrearages." These rulings were embodied in an order filed on February 7, 2000—the first of the orders appellant is challenging.

At the time of these rulings the court set a hearing "to consider the following issues: [¶] A. The division of the community interest in respondent's 401(k) account, including whether respondent should be required to take an additional payment pursuant to a qualified domestic relations order to pay off support arrearages due [appellant] by respondent. [¶] B. A review of respondent's child support obligation to [appellant] in consideration of the present circumstances of the parties. [¶] C. [Appellant's] request to

extend respondent's spousal support obligation beyond the date of its termination in December 1998." All of these matters appear to have been treated by the court as raised by a motion appellant had filed in December of 1998. The motion touched a number of subjects, among which were (1) to avoid the anticipated termination of spousal support, and (2) to "correct" errors and "glitches" in the formulation of child and spousal support.

With respect to the court's decision on these matters, all we have are minutes dated April 20, 2000 (which we will treat as an appealable minute order). The relevant portions of the minutes/order are as follows:

"As to the request to modify child support, the current order is for 3019/mos. That order was set on 12/29/98 and based on gross income to Husband of 131,796 and no income to Wife . . . . Currently, the Court finds Husband's gross income to be 196,780 from earnings and 297 from dividends. He has a health deduction of 155, child support from a previous marriage of 500 and business expenses of 781—all of which the court is allowing . . . . [¶] The Court is attributing to Wife an earning ability of 3000/mos. After her move to the East Coast she was, in fact, employed at such a rate. Without a doubt, she had employment during the marriage at a higher rate. However, the 3000 is the most recent indicator of her current earning ability given her other responsibilities of child rearing. Wife has recently chosen to enroll in law school and argues that no income should be attributed to her. That choice was made more than 7 years after the stipulated date of separation and more than 10 years after the actual date of separation of the parties. As will be more fully set forth below, her spousal support is terminated effective December 1998. The enrollment in law school is not part of any spousal support plan imposed by the Court. For those reasons, the Court is attributing 3000/mos to Wife. [¶] Based on those calculations, child support is set at 2825 retroactive to December 1999. [¶] . . . [¶]

"Regarding the request to continue spousal support past the termination date of December 1998, that request is denied. While Wife has presented a persuasive argument that she had health problems that prohibited her from seeking employment during that time, she has not sought employment since that time either. In addition, the Court

previously ordered the payment to her of $20,000 in relocation expenses, which should be factored into the picture. Once the spousal support arrears are paid, Husband has more than met his obligation for spousal support for a marriage of this duration. [¶] . . . [¶]

"Regarding Husband's request that the spousal support arrears be paid by a QDRO [Qualified Domestic Relations Order] for distribution of additional shares from the 401k, that request is granted with the additional order that the tax consequences to Wife of the transfer be calculated by her and an additional amount equal to her tax consequences be included in the transfer. Such a calculation may be made by April 15, 2001 so that the distribution is accomplished in two stages. Wife's argument is well taken that she will have to pay taxes on the spousal support arrears when received; she should not also be charged with the tax consequences of an early distribution.

"In terms of Wife's request for a recalculation of child and spousal support for the years 1995-1999, that request is denied as untimely. [¶] . . . [¶]

"Regarding the request for the Court to set **pre-separation** arrears in spousal support, that request is denied as untimely and without jurisdiction."

This is the second order appellant challenges.

REVIEW

I

Appellant's primary contention is that the trial court erred in imputing income to her in the course of reviewing respondent's child support obligation. In considering the matter of child support a court "may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." (Fam. Code, § 4058, subd. (b).) "Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire." (*In re Marriage of Regnery* (1989) 214 Cal.App.3d 1367, 1372.) As shown by the statutory language, the decision to impute income is confided to a trial court's discretion, and that decision will

be reversed on appeal only upon a showing that discretion was abused. (E.g., *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 994; *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1383.)

Appellant advised the trial court "I had always been employed in a professional capacity ever since graduating from college. I worked for 10 years and always did well," had been "a Vice President and Branch Manager," and "at the time of the marriage [i.e., 1989] I was earning $65,000 a year." Appellant testified to the court in January of 1998 that she has had approximately a dozen job interviews since 1996; her counsel advised the court that appellant "has a job interview tomorrow." Appellant does not dispute the finding that the $3,000 figure used by the court was what she earned at a job after the separation. The effect of the decision to impute income to appellant does not terminate respondent's obligation to pay monthly child support, but merely reduces it from $3,019 to $2,825. Coming barely two years after appellant received $20,000 in part for the express purpose of "work search," the difference of $194 does not amount to an abuse of discretion.

II

Appellant next contends the trial court abused its discretion when it allowed "business expenses" of $781 to be deducted from respondent's income for purposes of computing child support. The only explication for the figure is the following from respondent's income and expense declaration: "Necessary job-related expenses (attach explanation) . . . Estimate based on form 2106 for 1998 taxes."

"The annual net disposable income of each parent shall be computed by deducting . . . the actual amounts attributable to . . . [¶] (f) Job-related expenses, if allowed by the court after consideration of whether the expenses are necessary, the benefit to the employee, and any other relevant facts." (Fam. Code, § 4059.) Appellant argues that the claimed deduction was neither documented nor shown to have been actually incurred, was not shown to have been "mandatory" for respondent's job as a stockbroker, and may have been the result of fabrication. With respect to the last factor, credibility is an exclusive province of the trial court: "A reviewing court cannot substitute its evaluation

of . . . credibility for that of the fact finder." (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1183.) The eight-word explanation provided by respondent to the trial court can be read as a reference to either a state or federal tax form. We do not think the court would have been unreasonable in accepting that while holding a licensed securities job and earning almost $200,000 respondent would incur business expenses of less than one-half of one percent of that figure. Moreover, appellant furnishes no concrete basis for disputing the figure respondent provided and the court accepted. Accordingly, appellant has not affirmatively demonstrated error with an adequate record. (E.g., *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

III

Appellant argues that respondent got double use of the $20,000 payment. She reasons that it was intended as a "*payment* . . . for a work search and relocation," but he was later allowed to claim it as an "advance" on his support obligations.

The subject of a lump sum payment was introduced by appellant. Her counsel told the court at the trial prior to entry of the judgment: "Miss Anderson is looking for work now. . . . [¶] . . . [¶] When she finds work, it will be necessary for her to move wherever the job location is and relocate with the children, set up house, etc. She is asking for . . . spousal support for a minimum of one year, hopefully, for 18 months for the time period that she believes is reasonably necessary for her to conduct her job search to complete any necessary retraining and to relocate . . . . [¶] . . . Miss Anderson has been seriously hampered in her job search . . . . Until Mr. Anderson pays her *some substantial payment on account toward the amount he is found to owe her in this case*, she will be unable practically to conduct a job search, be unable to travel, etc." (Italics added.) "So we ask for [spousal support for] the duration [of appellant's job search]. We ask that the duration be conditioned that it be for a certain period of time. We would ask for this duration of 12 to 18 months. [¶] We also ask for an order that Mr. Anderson pay a certain minimum amount of money on account and that those two orders be related to one another and conditioned upon one another."

The court essentially ordered what appellant sought. Respondent was ordered to pay spousal support of $1,264 per month, ostensibly with no cut-off date. He was offered the option of paying appellant a lump sum of $20,000 "for work search and relocation expenses," in which case he need pay support only for nine months thereafter. Although there was no specific mention of treating the lump sum as a future offset, it was implicit in appellant's application. Insofar as the court did precisely what appellant sought, any error would be invited, thus precluding appellant from challenging it on appeal. (E.g., *In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, 1639-1640; *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501-502.)

The same conclusion may be reached from a different angle. The offset was allowed in the order filed on February 7, 2000, in response to respondent's motion to confirm the special master's accounting. There is nothing in the record prior to that date showing that appellant objected to the lump sum being so treated. That omission can also be treated as a bar against raising the issue for the first time on appeal. (E.g., *In re Marriage of Hinman, supra,* 55 Cal.App.4th 988, 1002; *In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1450-1451.)

IV

In April of 1998, after the January trial, but prior to entry of the judgment in December of that year, appellant's counsel inquired of the court about the "preferred method for handling a situation where there may have been a computer glitch or other problem related to support calculations." Counsel was advised that efforts to correct should be made after the judgment was entered. Nevertheless, appellant filed a modification motion eleven days before the judgment was entered on December 29, 1998. The next mention of the matter appears in a declaration from appellant dated February 15, 2000. In the order of April 20, 2000, the court denied appellant's "request for a recalculation of child and spousal support" as "untimely." Appellant contends this ruling was error.

Appellant was told by the court how to bring the purported computational error to the court's attention for correction. She could have done so once the judgment was

entered, but she did not do so, apparently believing that the motion already filed—contrary to the court's specific advice—would suffice. Appellant did nothing thereafter for 14 months. She filed none of various postjudgment motions, nor did she appeal from the judgment. The judgment therefore became final, and any error in it is now beyond our jurisdiction to correct. "A party who fails to take a timely appeal from a decision or order from which an appeal might previously have been taken cannot obtain review of it on appeal from a subsequent judgment or order." (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749.)

V

Appellant's next contention has numerous parts. As she puts it in the caption of her brief: "In post-dissolution orders filed February 7, 2000, and April 20, 2000, the court accepted without question the D.A.'s September 27, 1999 accounting of arrears, when that accounting was inconsistent with the D.A.'s previous accountings and with accountings prepared by the United States Department of Justice, and when it violated the provisions of previous court orders for support, and also violated well documented matters of law. Wife was prevented from equal participation in the process, and Wife respectfully requests that the trial court's decision to completely delegate the arrears issue to the D.A. be overturned for an abuse of discretion."

In designating a deputy district attorney to act as a special master with respect to the issue of arrearages, the trial court was appointing what our statutes call a referee. "The Code of Civil Procedure provides for two types of reference. A 'general' reference is conducted pursuant to section 638, subdivision 1: the referee is empowered to make a conclusive determination without further action by the court. . . . In order to comport with the constitutional prohibition against delegation of judicial power, a general reference requires consent of the parties. . . . [¶] A 'special' reference is one conducted pursuant to section 639 or subdivision 2 of section 638, in which the referee makes advisory findings which do not become binding unless adopted by the court." (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1208, fn. omitted.)

This discussion settles many points of appellant's argument. It is apparent that the referral to the deputy district attorney was a special reference. The only subject was arrearages. As evidenced by respondent's motion to confirm the resulting accounting, the deputy was not given ultimate authority over that subject. It is therefore incorrect for appellant to speak of the issue being "completely delegate[d] . . . to the D.A." Although consent was not required, there is nothing in the record that suggests that appellant had any problem with a limited reference. Once the referee submitted her report it still required, and received, approval by the court.

Appellant was allowed to, and did, submit material to the referee. Until this appeal, she made no claim that the hearing conducted by the referee was in any way improper. In fact, there is nothing in the record that shows that appellant raised any objections to the trial court as a reason why the deputy's accounting should not be confirmed on its merits. As previously mentioned, those objections are not properly before this court for the first time. (E.g., *In re Marriage of Hinman*, *supra*, 55 Cal.App.4th 988, 1002; *In re Marriage of Freeman*, *supra*, 45 Cal.App.4th 1437, 1450-1451.)

VI

Appellant's next contention is that she "contests the court's termination of spousal support." It is apparent from the discussion in her brief that appellant is contesting two separate rulings.

The first is the provision in the judgment for automatic termination if respondent made the $20,000 lump sum payment. (See part III, *ante*.) As previously mentioned, appellant's failure to prosecute a timely appeal from the judgment puts this part of her argument beyond reach. (*Ostling v. Loring*, *supra*, 27 Cal.App.4th 1731, 1749.) The second part of appellant's challenge is to that part of the April 20, 2000, order that denied her request to continue requiring respondent to pay her spousal support. That ruling is reviewed for abuse of discretion. (E.g., *In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 478; *In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 76-78.)

A major component of the trial court's reasoning was its determination that appellant was able to earn $3,000 per month on her own. That determination we have already held did not constitute an abuse of discretion. (See part I, *ante*.) Appellant obviously and understandably places great emphasis upon the state of her health, but it is clear that this factor was considered by the trial court. The court was also impressed by the fact that appellant had already received support for much longer than the duration of the marriage (see Fam. Code, § 4320, subd. (f)) and had received a sizable payment from respondent for the purpose of allowing appellant to reestablish her ability to support herself. The issue could have gone either way, but reversal is required only if the trial court exceeded the bounds of reason. (See *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449 and authorities cited.) That did not occur here.

VII

Appellant's next contention, again quoting from the caption of brief, is that "At dissolution proceedings the trial court allowed Wife to recover from Husband a portion of the loans the community owed her mother for ATM and cash advances . . ., and when [Wife properly] submitted the documentation requested by the court . . ., the court arbitrarily denied its previous order for reimbursement . . . . Wife respectfully requests that this denial be reversed for abuse of discretion." This is another dispute that was subsumed in the judgment filed in December of 1998 that cannot be addressed on this appeal. (*Ostling v. Loring*, *supra*, 27 Cal.App.4th 1731, 1749.)

VIII

Appellant argues that the court's order allowing respondent to pay his arrearages using a QDRO "creates the likelihood of an enforcement problem that, like arrears, could be problematic for years." It is not hard to imagine that the history of this litigation has given appellant a fear of future difficulties, but the fact remains that the problems she fears are not so much in the court's order itself, but in what she anticipates will be its implementation. If that happens, appellant's recourse is in the trial court. So long as matters remain in the realm of the abstract, there is no basis for this appellate court to find

either error or abuse of discretion. (E.g., *Denham v. Superior Court, supra*, 2 Cal.3d 557, 564; *Estate of Gilkison*, *supra*, 65 Cal.App.4th 1443, 1449.)

IX

Appellant's final issue is a request that we award her the amount of attorney fees she incurred to her "former appellate counselor, Michael Willemsen . . . ." It appears from the record that Mr. Willemsen's participation in this case began with filing a notice of appeal on appellant's behalf and ended sometime before appellant filed her opening brief in propria persona. Appellant presents no specific amount for the requested award, nor any particulars of how it was incurred. The request is hereby denied.

The orders are affirmed.

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Kay, J.

We concur:

_____
Reardon, Acting P.J.

_____
Sepulveda, J.